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2005

# State of Utah v. Randall K. Johns : Brief of Appellee

Utah Court of Appeals

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Randall W. Richards; The Public Defender; Association of Weber County; Attorney for Appellant.

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### Recommended Citation

Brief of Appellee, *Utah v. Johns*, No. 20050746 (Utah Court of Appeals, 2005).

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH	:	
Plaintiff/Appellee	:	Case No. 20050746-CA
vs.	:	
RANDALL K. JOHNS,	:	
Defendant/Appellant	:	

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BRIEF OF APPELLEE

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APPEAL FROM A PLEA OF GUILTY AND MENTALLY ILL TO CHILD KIDNAPPING, A FIRST-DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-5-301.1 (WEST 2004), IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR WEBER COUNTY, THE HONORABLE MICHAEL D. LYON PRESIDING

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FILED  
UTAH APPELLATE COURT

JUN 19 2005

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH	:	
Plaintiff/Appellee	:	
vs.	:	Case No. 20050746-CA
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BRIEF OF APPELLEE

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## TABLE OF CONTENTS

	Page
TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	ii
JURISDICTION AND NATURE OF THE PROCEEDINGS .....	1
ISSUES ON APPEAL AND STANDARDS OF APPELLATE REVIEW .....	1
STATUTES AND RULES .....	2
STATEMENT OF THE CASE .....	2
STATEMENT OF FACTS .....	6
SUMMARY OF ARGUMENT .....	7
ARGUMENT	
I. THIS COURT LACKS JURISDICTION TO HEAR DEFENDANT’S APPEAL AND SHOULD THEREFORE DISMISS IT .....	7
CONCLUSION .....	9
ADDENDA	
Addendum A. Statutes and Rule	
Addendum B. Minutes Sentence, Judgment, Commitment	

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Anders v. California</i> , 386 U.S. 738 (1967) .....	6
---	---

### STATE CASES

<i>Myers v. State</i> , 2004 UT 31, 94 P.3d 211 .....	1
<i>State v. Adams</i> , 26 Utah 2d 377, 489 P.2d 1191 (1971) .....	6
<i>State v. Bullock</i> , 791 P.2d 155 (Utah 1989), <i>cert. denied</i> , 497 U.S. 1024 (1990) .....	8
<i>State v. Clayton</i> , 639 P.2s (Utah 1981) .....	6
<i>State v. Holm</i> , 2006 UT 31, __ P.3d. __ .....	1
<i>State v. Manning</i> , 2004 UT App 87, 89 P.3d 196 .....	8
<i>State v. Merrill</i> , 2005 UT 61 .....	8
<i>State v. Reyes</i> , 2002 UT 13, 40 P.3d 630 .....	8

### STATE STATUTES AND RULE

Utah Code Ann. § 76-5-301.1 (West 2004) .....	1, 2, 6
Utah Code Ann. § 77-13-6 (West 2004) .....	2, 8
Utah Code Ann. § 77-15-5 (West 2004) .....	3
Utah Code Ann. 77-15-6 (West 2004) .....	8
Utah Code Ann. § 77-16a-103 (West 2004) .....	3
Utah Code Ann. § 78-2a-3 (West 2004) .....	1
Utah R. Crim. P. 22 .....	6



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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH	:	
Plaintiff/Appellee	:	Case No. 20050746-CA
vs.	:	
RANDALL K. JOHNS	:	
Defendant/Appellant	:	

---

**BRIEF OF APPELLEE**

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**JURISDICTION AND NATURE OF THE PROCEEDINGS**

This is an appeal from a plea of guilty and mentally ill to child kidnapping, a first degree felony, in violation of UTAH CODE ANN. § 76-5-301.1 (West 2004), in the Second Judicial District Court, in and for Weber County, the Honorable Michael D. Lyon presiding. This Court has jurisdiction of this appeal pursuant to UTAH CODE ANN. § 78-2a-3(2)(j) (West 2004).

**ISSUES ON APPEAL AND  
STANDARDS OF APPELLATE REVIEW**

1. Does this court have jurisdiction to consider defendant's challenges to his guilty and mentally ill plea where defendant has never moved to withdraw his guilty plea?

No standard of review applies to this issue, but jurisdictional questions in criminal cases can be raised at any time by any party, as well as by the court. *State v. Holm*, 2006 UT 31, ¶ 96, — P.3d. —; *Myers v. State*, 2004 UT 31, ¶ 16, 94 P.3d 211.

## STATUTES AND RULE

The following statutes are attached at Addendum A:

UTAH CODE ANN. § 76-5-301.1 (West 2004);  
UTAH CODE ANN. § 77-13-6 (West 2004);  
Rule 22, Utah Rules of Criminal Procedure.

## STATEMENT OF THE CASE

Defendant was charged with child kidnapping, a first degree felony, in violation of UTAH CODE ANN. § 76-5-301.1 (West 2004). R1. In July 2004, the trial court ordered and received reports from two mental health examiners, Rhett F. Potter, a licensed social worker, and Rick Hawks, Ph. D, a psychologist. R28-30; 113:2.<sup>1</sup> Both examiners found defendant to have borderline intelligence. *See* Potter, at 3; Hawks I, at 6. Dr. Hawks found defendant to suffer from a “mild mental illness.” Hawks I, at 6. Nevertheless, both examiners opined that defendant would have been capable of forming the intent to commit the offense and was competent to stand trial. R113:2; Potter, at 4-5; Hawks I, at 5-6. The court found defendant competent to proceed. R32.

At a pretrial conference on November 18, defense counsel informed the court that defendant intended to plead guilty and mentally ill. R41. The prosecutor asked the court to appoint a third alienist to determine if defendant suffered from a mental illness. *Id.* The court continued the matter. *Id.* On December 2, 2004, defendant agreed to enter a plea of

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<sup>1</sup> The reports of all mental health examiners are enclosed in an unpaginated envelope. Citation to the reports are by author and page.

guilty and mentally ill pursuant to UTAH CODE ANN. § 77-16a-103 (West 2004). R114:2. The court engaged in a colloquy with defendant to ensure that the plea was knowing and voluntary, and thereafter accepted the plea. R114:4-5, 8.

Going beyond the prosecutor's earlier request, the court ordered a third mental health examination, to determine not only whether defendant was currently mentally ill under section 77-16a-103 (3)(b) and - (4), but also whether he was competent to proceed under UTAH CODE ANN. § 77-15-5 (West 2004). R41, 53-55; 114:2-3, 9. The third evaluator, Beverly O'Connor, Ph.D, examined defendant on January 4, 2005. *See O'Connor I*, at 1. She seriously questioned defendant's competence to proceed, but ultimately opined that it was "indeterminate" at that time: "At this time I don't believe that there is enough information to make a definitive assessment regarding [defendant's] competency to stand trial . . . ." *Id.* at 5-9. She also opined that his low IQ and neuropsychological impairments "may have prevented [defendant] from forming the required mental state" and that his mental defects likely resulted in "a moderate to significant level of diminished capacity at the time of the offense." *Id.* at 9. Based on her evaluation, Dr. O'Connor recommended that defendant be sent to the State Hospital for a full evaluation if the court found him competent to proceed. *O'Connor I*, at 9.

At a hearing on January 13, the trial court considered how it should proceed in light of Dr. O'Connor's report. R115:2-6. The court concurred with Dr. O'Connor's views and, with defense counsel's agreement, ordered that defendant undergo further evaluation to see



if defendant could be rehabilitated. R60; 115:3-6. Based on its concerns about defendant's competence, the court also asked the prosecutor and defense counsel to consider whether the plea might have to be vacated. R115:5-7.

In response to the court's order, Dr. Hawks submitted an additional report on February 10, addressing whether defendant was currently mentally ill. R60; Hawks II, at 2. Dr. Hawks essentially reiterated the mental health findings up to that point and stated that although all the evaluators agreed that defendant suffered from a mental defect and/or illness, they disagreed as to its impact on his behavior. Hawks II, at 3.

On March 21, after considering all the reports in their totality, the court found that defendant suffered from a significant mental defect. R116:5. The court also all but concluded that defendant was then incompetent to proceed: "[He suffers from impairment in his capacity to reason and consider the consequences and make judgments. And I think it's a reasonable extension of that he does not also have the ability to consult effectively with his counsel . . . . There's nothing in [Dr. O'Connor's] report that persuades me that he's capable of being restored." *Id.* Concerned whether defendant was competent to enter a guilty and mentally ill plea, the court suggested that the prosecutor consider filing civil proceedings, with which defense counsel concurred. The court gave the prosecutor two weeks to determine how he wished to proceed with the case. R116.5-6.

On April 7, after expressing concern that earlier reports threw doubt on defendant's competence to proceed, the trial court suggested that defendant move to withdraw his guilty

and mentally ill plea. R117:3-4. The question then arose as to whether defendant was competent to file such a motion. R117:4. The prosecutor argued that defendant must be restored to competency before he could move to withdraw his plea. The prosecutor argued that for that purpose defendant should be sent to the state hospital to see if he could be restored, after which he might move to withdraw his plea. R117:4. Defense counsel agreed with this proposal. R117:5-6. Relying on Dr. O'Connor's follow-up report, dated April 4, which again stated that defendant was currently mentally ill, but now suggested that defendant's psychiatric status might be improved with medications and treatment, the court found defendant mentally incompetent and recommended that he be placed in the state hospital for 90 days in an attempt to restore defendant to competency for sentencing. R69-70; 117:7; O'Connor II, at 11.

On June 27, Dr. Gerald Bergs, Ph. D., issued a report concluding that defendant was competent to proceed. Bergs, at 4. On July 11, the trial court acknowledged Dr. Bergs's conclusion and stated that it was ready to proceed to sentencing based on defendant's unconditional guilty and mentally ill plea. R118:2. Defense counsel agreed, but requested a presentence investigation report (PSI), which the court ordered. R118:3-4.

At sentencing on August 15, defense counsel stated after reading the mental health evaluations that "while [defendant] has issues, . . . he's certainly culpable for what he did." R119:3. While also acknowledging that defendant "has issues," the trial court was "satisfied" based on the "totality of [the] reports" that defendant was competent to stand trial.



R119:4. The trial court then acted on defendant's plea, sentencing him to an indeterminate prison term of five years to life. R83-84; 119:5. Defendant timely appealed.<sup>2</sup>

### STATEMENT OF FACTS<sup>3</sup>

On May 6, 2004, 11-year-old Jake Pecht was fishing on the Ogden River when he met defendant. R12, 114:5. After talking for a while, Jake asked defendant if he could use his

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<sup>2</sup> This court later moved sua sponte for summary dismissal, apparently because defendant had failed to identify any issues on appeal. The State filed a response, supporting the Court's motion, and further seeking a remand for the correction of the imposition of an illegal sentence. Defendant did not oppose the motion because he was unable to identify any ground on appeal to do so. See Order of the court of appeal, dated October 13, 2005 (Order). The Court concluded that defendant's response implicated *Anders v. California*, 386 U.S. 738 (1967), and therefore withdrew its sua sponte motion, ordering that defendant might identify issues on appeal or file a brief compliant with *Anders* and *State v. Clayton*, 639 P.2s 168 (Utah 1981). See Order.

The State's request that the case be remanded to the lower court to correct the imposition of an illegal sentence was based on rule 22(e), Utah Rules of Criminal Procedure. See Utah R. Crim. P. 22(e) ("The court may correct an illegal sentence . . . at any time."); *State v. Adams*, 26 Utah 2d 377, 489 P.2d 1191, 1194 (1971) (where an improper sentence is imposed, a remand is necessary "for the imposition of a correct sentence consistent with the language of the statute[.]")

Here, defendant was charged with child kidnapping, a first degree felony, in violation of UTAH CODE ANN. § 76-5-301.1 (West 2004). R1. Section 76-5-301.1 provides that child kidnapping is "punishable by imprisonment for an indeterminate terms of not less than 6, 10, or 16 years and which may be for life." Utah Code Ann. § 76-5-301.1(3) (West 2004) (Addendum A). However, the lower court ultimately sentenced defendant to an indeterminate term of *five* years to life. R83-84 (Addendum B). Accordingly, the sentence imposed by the lower court does not comport with the language of the statute and is, therefore, an illegal sentence which requires correction. The State renews its request for the correction of the illegal sentence.

<sup>3</sup> Because there was no trial in this case, the facts are taken from the warrant affidavit, R12-13, and the plea hearing, R114. Where there are discrepancies between the two, this statement of facts follows the affidavit, which the officer prepared after speaking with the victim a few days after the incident.

telephone to call for a ride home. R12. Defendant replied that he did not have a telephone with him, but that his home was nearby and Jake could use the telephone there. *Id.* As soon as they arrived at defendant's home and entered the kitchen, defendant ordered Jake to go into a back bedroom. *Id.* When Jake refused, defendant grabbed a four-inch steak knife and threatened to stab him if he did not comply. *Id.* Jake was able to get hold of another knife to defend himself, which prompted defendant to go into the front room and grab a baseball bat. R12-13, 114:5. When defendant did so, Jake shut the kitchen door and jammed it with the knife he had just grabbed. R13. While defendant was breaking the door down, Jake fled out the back door, leaving behind his fishing pole and tackle box. R13, 16. Defendant, baseball bat in hand, gave chase, but Jake was able to escape unharmed. R13.

### **SUMMARY OF ARGUMENT**

This Court lacks jurisdiction to hear defendant's appeal because he never moved to withdraw his guilty and mentally ill plea, and should therefore dismiss it.

### **ARGUMENT**

#### **I. THIS COURT LACKS JURISDICTION TO HEAR DEFENDANT'S APPEAL AND SHOULD THEREFORE DISMISS IT**

This Court should dismiss defendant's appeal because it lacks jurisdiction. On December 2, 2004, defendant entered a plea of guilty and mentally ill which the court determined to be knowing and voluntary. R114:2, 4-5, 8. Defendant was found competent to proceed at a hearing on July 11, 2005. R118:2. After waiting more than a month while a presentence report was prepared, the court, in accordance with statutory requirements, *see*



UTAH CODE ANN. §§ 77-15-6 and 77-16a-103 (West 2004), proceeded with sentencing on 15 August. Under UTAH CODE ANN. § 77-13-6 (West 2004), defendant was required to move to withdraw his plea, if at all, before the announcement of sentence. Defendant did not do so. *See* R119. Failure to comply with this statute deprives an appellate court of jurisdiction to review a plea challenge, even under plain error or exceptional circumstances, because the statute relates to jurisdiction, not preservation. *State v. Reyes*, 2002 UT 13, ¶¶ 3-4, 40 P.3d 630; *State v. Manning*, 2004 UT App 87, ¶ 30, 89 P.3d 196; *see also State v. Merrill*, 2005 UT 61, ¶ 36.<sup>4</sup>

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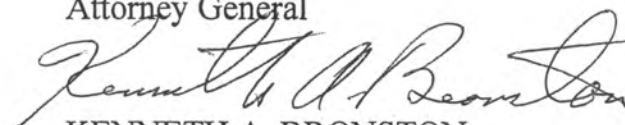
<sup>4</sup> The Court's lack of jurisdiction forecloses consideration of the merits of defendant's claims of plain error and ineffective assistance of counsel. Those claims are based on the trial court's failure to find, and defense counsel's failure to move, that defendant was incompetent when he entered his guilty and mentally ill. Aplt. Br. at 10-20. Those claims fail because defendant invited any error by consciously and reasonably refusing to withdraw the plea on grounds of defendant's incompetency, a tactic grounded by the absence of any record support that defendant was incompetent when he entered his plea or that he would benefit from any such withdrawal. R115:4; 116:5-6; 117:6; R118:2; 119:3; and reports of mental health examiners: Potter at 4-5, Hawks I at 1, Hawks II at 2, O'Connor I at 5-9, O'Connor II at 11, and Berge at cover page. *See State v. Bullock*, 791 P.2d 155, 158-60 (Utah 1989) (declining to examine plain error claim when counsel's choice not to object was grounded in conscious trial strategy and did not constitute ineffective assistance of counsel), *cert. denied*, 497 U.S. 1024 (1990).

## CONCLUSION

Based on the foregoing discussion, the State respectfully requests that defendant's conviction be affirmed.

RESPECTFULLY SUBMITTED this 19<sup>th</sup> day of June, 2006.

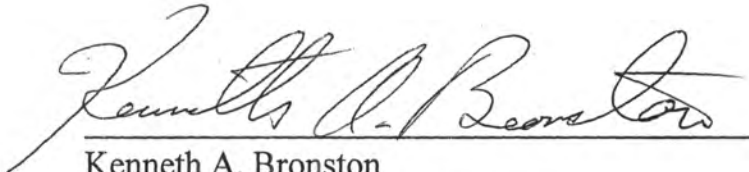
MARK L. SHURTLEFF  
Attorney General



KENNETH A. BRONSTON  
Assistant Attorney General

### CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to Randall w. Richards, the Public Defender Association of Weber County, attorneys for defendant, 2550 Washington Boulevard, Suite 300, Ogden, Utah 84401, this <sup>th</sup>19 day of June, 2006.

A handwritten signature in cursive script, reading "Kenneth A. Bronston", written over a horizontal line.

Kenneth A. Bronston  
Assistant Utah Attorney General

# Addenda



# Addendum A

## CRIMINAL CODE

### § 76-5-301.1. Child kidnapping

(1) An actor commits child kidnapping if the actor intentionally or knowingly, without authority of law, and by any means and in any manner, seizes, confines, detains, or transports a child under the age of 14 without the consent of the victim's parent or guardian, or the consent of a person acting in loco parentis.

(2) Violation of Section 76-5-303 is not a violation of this section.

(3) Child kidnapping is a first degree felony punishable by imprisonment for an indeterminate term of not less than 6, 10, or 15 years and which may be for life. Imprisonment is mandatory in accordance with Section 76-3-406.

Laws 1983, c. 88, § 14; Laws 1984, c. 18, § 6; Laws 1995, c. 337, § 3, eff. May 1, 1995; Laws 1995, 1st Sp. Sess., c. 10, § 4, eff. April 29, 1996; Laws 1996, c. 40, § 5, eff. April 29, 1996; Laws 2001, c. 301, § 3, eff. April 30, 2001.

## CODE OF CRIMINAL PROCEDURE

### § 77-13-6. Withdrawal of plea

(1) A plea of not guilty may be withdrawn at any time prior to conviction.

(2)(a) A plea of guilty or no contest may be withdrawn only upon leave of the court and a showing that it was not knowingly and voluntarily made.

(b) A request to withdraw a plea of guilty or no contest, except for a plea held in abeyance, shall be made by motion before sentence is announced. Sentence may not be announced unless the motion is denied. For a plea held in abeyance, a motion to withdraw the plea shall be made within 30 days of pleading guilty or no contest.

(c) Any challenge to a guilty plea not made within the time period specified in Subsection (2)(b) shall be pursued under Title 78, Chapter 35a, Post-Conviction Remedies Act, and Rule 65C, Utah Rules of Civil Procedure.

Laws 1980, c. 15, § 2; Laws 1989, c. 65, § 1; Laws 1994, c. 16, § 1; Laws 2003, c. 290, § 1, eff. May 5, 2003; Laws 2004, c. 90, § 91, eff. May 3, 2004.

## **RULES OF CRIMINAL PROCEDURE**

### **RULE 22. SENTENCE, JUDGMENT AND COMMITMENT**

(a) Upon the entry of a plea or verdict of guilty or plea of no contest, the court shall set a time for imposing sentence which shall be not less than two nor more than 45 days after the verdict or plea, unless the court, with the concurrence of the defendant, otherwise orders. Pending sentence, the court may commit the defendant or may continue or alter bail or recognizance.

Before imposing sentence the court shall afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment, or to show any legal cause why sentence should not be imposed. The prosecuting attorney shall also be given an opportunity to present any information material to the imposition of sentence.

(b) On the same grounds that a defendant may be tried in defendant's absence, defendant may likewise be sentenced in defendant's absence. If a defendant fails to appear for sentence, a warrant for defendant's arrest may be issued by the court.

(c) Upon a verdict or plea of guilty or plea of no contest, the court shall impose sentence and shall enter a judgment of conviction which shall include the plea or the verdict, if any, and the sentence. Following imposition of sentence, the court shall advise the defendant of defendant's right to appeal and the time within which any appeal shall be filed.

(d) When a jail or prison sentence is imposed, the court shall issue its commitment setting forth the sentence. The officer delivering the defendant to the jail or prison shall deliver a true copy of the commitment to the jail or prison and shall make the officer's return on the commitment and file it with the court.

(e) The court may correct an illegal sentence, or a sentence imposed in an illegal manner, at any time.

(f) Upon a verdict or plea of guilty and mentally ill, the court shall impose sentence in accordance with Title 77, Chapter 16a, Utah Code. If the court retains jurisdiction over a mentally ill offender committed to the Department of Human Services as provided by Utah Code Ann. § 77-16a-202(1)(b), the court shall so specify in the sentencing order.

[Amended effective January 1, 1995; January 1, 1996.]

# Addendum B



2005 AUG 15 P 4:45

SECOND DISTRICT COURT - OGDEN COURT  
WEBER COUNTY, STATE OF UTAH

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STATE OF UTAH, : MINUTES  
Plaintiff, : APP SENTENCING  
: SENTENCE, JUDGMENT, COMMITMENT  
:  
:  
vs. : Case No: 041903027 FS  
AUG 12 2005  
RANDALL KEVIN JOHNS, : Judge: MICHAEL D. LYON  
Defendant. : Date: August 15, 2005

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PRESENT

Clerk: shannone  
Reporter: SHINGLE, LAURIE  
Prosecutor: BRENDA BEATON  
Defendant  
Defendant's Attorney(s): MIKE BOUWHUIS, PDA

DEFENDANT INFORMATION

Date of birth: October 1, 1963  
Video

CHARGES

1. CHILD KIDNAPPING - 1st Degree Felony  
Plea: Guilty - Disposition: 08/15/2005 Guilty

HEARING

This is time set for sentencing. The defendant is present in custody and represented by Mike Bouwhuis.

Defense counsel addresses the Court and requests credit for the time that the defendant has served and formal probation.

The State requests that a prison commitment be imposed based on the type of crime.

Based on the four mental evaluations submitted to the court, the Court is satisfied that the defendant is competent to proceed.

Case No: 041903027  
Date: Aug 15, 2005

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SENTENCE PRISON

Based on the defendant's conviction of CHILD KIDNAPPING a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than five years and which may be life in the Utah State Prison.

To the WEBER County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

Dated this 15 day of Aug, 2005.

Michael D. Lyon  
MICHAEL D. LYON  
District Court Judge